KUMPULAN PERANGSANG SELANGOR BHD.

v.

ZAID MOHD NOH

SUPREME COURT, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
ANUAR ZAINAL ABIDIN CJ (MALAYA)
GOPAL SRI RAM JCA
[CIVIL APPEAL NO: 02-57-93]
25 NOVEMBER 1996

ADMINISTRATIVE LAW: *Dismissal - Industrial Court - Functions - Whether dutybound to scrutinise the pleadings and identify the issues - Finding of fair and just dismissal - Finding founded on unpleaded reasons - Whether an error of law - Whether a misdirection*

ADMINISTRATIVE LAW: *Dismissal - Industrial Court - Adjudication process - Technical rules - Whether applicable to industrial adjudication - Payment of retrenchment benefit - Whether employee estopped from claiming*

ADMINISTRATIVE LAW: *Judicial review - Decisions of inferior tribunals - Jurisdiction and powers of superior Courts - Scope of review jurisdiction - Whether only confined to decision-making process - Whether could also review merits of decision*

ADMINISTRATIVE LAW: *Judicial review - Decisions of inferior tribunals - Jurisdiction and powers of superior Court - Whether seised with jurisdiction and power to make consequential order - Rules of the Supreme Court 1980, r. 51 sub-rr. 4 & 5 - Courts of Judicature Act 1964, s. 69(4)*

The appellant had terminated the employment of the respondent on the grounds that the latter's post had been abolished and become redundent. Prior to the termination, the appellant had paid the respondent retrenchment benefit of RM 15,296.32, which sum the respondent accepted on a without prejudice basis. In subsequent proceedings for unfair dismissal before the Industrial Court, the appellant did not lead any evidence to support its contention of a fair dismissal, but contended nonetheless that the respondent was estopped from claiming by reason of his acceptance of redundency benefit. The learned Chairman ruled that the appellant had proved its claim of a redundency, that there was good reason for the respondent's post to be abolished, and that the dismissal was therefore a fair one. It was also ruled that the respondent, having accepted the redundency benefit, was precluded from claiming that he had been dismissed without just cause or excuse.

Dissatisfied, the respondent moved for *certiorari*. The High Court held that as loss was never pleaded, the Industrial Court had misdirected itself and committed an error of law when it found that the appellant had made out a case of redundency. The learned Judge also held that the Industrial Court's decision on the point of estoppel was perverse, as technical rules such as estoppel, limitation or laches had no application in industrial adjudication. The High Court, in the circumstances, quashed the award, granted the *certiorari* order sought for, and issued a *mandamus* directing the Industrial Court to readjudicate the dispute.

The appellant appealed and argued that the learned Judge, in quashing the award, had exceeded his role in judicial review proceedings. It was further argued that even if the Judge had not exceeded his role, he was nevertheless wrong in his conclusions, as a reasonable tribunal, appraised of the facts, would have come to the same conclusion as did the Industrial Court. Before the learned Judges of the Supreme Court, the following questions arose for determination:

(i) Whether the respondent was dismissed with just cause or excuse.

(ii) Whether technical rules such as estoppel, limitation, laches etc. could apply to industrial adjudication.

(iii) Whether the appellate Courts, in certiorari proceedings, could examine both the decision-making process as well as the merits of the decision.

(iv) Whether the consequential order made by the learned Judge remitting the matter to the Industrial Court should remain, or whether it ought to be substituted for other more appropriate relief.

Held:

Per Gopal Sri Ram JCA

[1] The learned Judge had not erred in issuing *certiorari* and in quashing the award of the Industrial Court.

[2] It is trite law that a party is bound by its pleadings. The Industrial Court therefore must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues.

[3] In the instant case, not only did the appellant fail to allege that there were losses, it singularly failed to lead any evidence in support of its claim that the post previously held by the respondent had been abolished. There was thus no proof that the respondent's post had been abolished, and nor was there a specific finding by the Industrial Court that the post had been abolished.

[4] The material made available at all levels admits only of one reasonable inference, namely, that the respondent's post was not abolished. It follows that not only did the Industrial Court find for the appellant on an unpleaded case, but the appellant had itself failed to make out the jurisdiction relied upon by it. There was therefore no redundency as alleged by the respondent. The inevitable conclusion is that the respondent was dismissed from his employment and that his dismissal was without just cause or excuse.

[5] Until very recently, it was generally thought that when a decision is challenged on the grounds of "Wednesbury unreasonableness", the Court is confined to an examination of the decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach. The fallacy of this doctrine was exploded by the landmark decision of this Court in *R. Rama Chandran v. Industrial Court of Malaysia.*

[6] An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, does not occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in *certiorari* proceedings.

[7] There may be cases in which, for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the Courts to attempt any substitution of views. The instant case, however, does not fall within any of the exceptions. The learned judge, therefore, was not only entitled but bound by duty to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like decision. There was thus no misdirection by the learned Judge herein upon the basis of intervention and no transgression of the prescribed parameters of judicial review.

[8] It is trite that the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. The doctrine of estoppel, hence, is not to be applied in industrial adjudication. The learned Judge was therefore entirely correct in his observation that the Industrial Court had erred in law when it applied the doctrine of estoppel to the process of industrial adjudication before it. And since a public decision-maker has no jurisdiction to make an error of law, the learned Judge was also entitled to hold that the Industrial Court, in so doing, had exceeded its jurisdiction.

[9] Until the decisions in *R. Rama Chandran v. Industrial Court of Malaysia* and *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan,* the view generally held was that the only course open to the High Court when it quashed an award of the Industrial Court was to remit the dispute to that Court for re-adjudication. This narrow and restrictive approach was rightly cast aside by this Court in *R. Rama Chandran* and by the Court of Appeal in *Hong Leong Equipment.*

[10] This Court has the jurisdiction and the power to grant relief to the respondent. In the circumstances of this case, however, compensation rather than reinstatement is the more appropriate remedy. As there was no dispute upon the issue of quantum, a sum of RM151,997 as agreed is awarded to the respondent in addition to payment of his EPF contributions.

[Appeal dismissed. Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PENTADBIRAN: *Pemecatan - Mahkamah Perindustrian - Fungsi-fungsi - Samada berkewajipan untuk meneliti pliding dan mengenalpasti isu-isu - Keputusan bahawa pemecatan adalah adil dan munasabah - Keputusan diasaskan pada alasan yang tidak diplidkan - Samada merupakan kesilapan undang-undang - Samada suatu salah arahan*

UNDANG-UNDANG PENTADBIRAN: *Pemecatan - Mahkamah Perindustrian - Proses adjudikasi - Kaedah-kaedah teknikal - Samada terpakai kepada adjudikasi perindustrian - Pembayaran faedah pemberhentian - Samada pekerja diestop daripada menuntut*

UNDANG-UNDANG PENTADBIRAN: *Kaji semula kehakiman - Keputusan tribunal bawahan - Bidangkuasa dan kuasa-kuasa Mahkamah atasan - Skop kaji semula bidangkuasa - Samada hanya terletak kepada proses membuat keputusan sahaja - Samada boleh juga mengkaji semula merit-merit keputusan*

UNDANG-UNDANG PENTADBIRAN: *Kaji semula kehakiman - Keputusan tribunal-tribunal bawahan - Bidangkuasa dan kuasa-kuasa Mahkamah atasan - Samada mempunyai bidangkuasa dan kuasa untuk membuat perintah berbangkit - Kaedah-kaedah Mahkamah Agung 1980 k. 51 kaedah-kaedah kecil 4 & 5 - Akta Mahkamah Kehakiman 1964 s. 69(4)*

Perayu telah menamatkan pekerjaan responden atas alasan bahawa jawatannya telah dihapuskan dan menjadi berlebihan. Sebelum penamatan itu, perayu telah membayar respondan faedah-faedah pengurangan tenaga kerja sebanyak RM15,296.32 yang mana jumlah itu telah diterima oleh responden atas dasar tanpa memudaratkan. Dalam prosiding berikutnya bagi pemecatan yang tidak adil di hadapan Mahkamah Perindustrian, perayu tidak mengemukakan apa-apa keterangan untuk menyokong penegasannya akan suatu pemecatan secara adil, tetapi telah namun begitu menegaskan bahawa responden telah diestop daripada menuntut kerana penerimaan olehnya akan faedah pemberhentian. Pengerusi yang bijaksana telah memutuskan bahawa perayu telah membuktikan tuntutannya berhubung lebihan tenaga kerja, bahawa terdapat alasan-alasan yang sewajarnya bagi menghapuskan jawatan responden, dan oleh itu pemecatan tersebut adalah suatu tindakan yang adil. Telah juga diputuskan bahawa responden, oleh kerana telah menerima faedah pemberhentian, adalah dengan itu terhalang daripada menuntut bahawa beliau telah dipecat tanpa alasan atau sebab yang adil.

Berasa tidak puashati, responden telah mengusul bagi mendapatkan *certiorari.* Mahkamah Tinggi memutuskan bahawa oleh kerana kerugian tidak pernah diplidkan, maka Mahkamah Perindustrian telah tersalah arah akan dirinya dan melakukan kesilapan undang-undang apabila ianya mendapati bahawa perayu telah mewujudkan satu kes lebihan tenaga kerja. Hakim yang bijaksana telah juga memutuskan bahawa keputusan Mahkamah Perindustrian mengenai perkara estopel adalah salah, kerana kaedah teknikal seperti estopel, penghadan atau kecuaian (laches) tidak terpakai dalam adjudikasi perindustrian. Mahkamah Tinggi, dalam keadaan sedemikian, telah membatalkan award tersebut, memberikan perintah *certiorari* yang dipohon, dan mengeluarkan suatu *mandamus* mengarahkan Mahkamah Perindustrian untuk mengadjudikasikan semula pertikaian tersebut.

Perayu telah merayu dan berhujah bahawa Hakim yang bijaksana, dalam membatalkan awardnya, telah melampaui peranannya dalam prosiding kajian semula kehakiman. Selanjutnya dihujahkan bahawa jikapun Hakim tidak melampaui peranannya, beliau namun begitu salah dalam kesimpulannya, kerana suatu tribunal yang munasabah, berhadapan dengan fakta-fakta yang wujud, akan mencapai keputusan yang sama seperti yang dicapai oleh Mahkamah Perindustrian. Di hadapan Hakim-hakim Mahkamah Agung yang bijaksana, persoalan-persoalan berikut telah berbangkit untuk penentuan:

(i) Samada responden te1ah dipecat atas a1asan atau sebab yang adil.

(ii) Samada kaedah-kaedah teknikal seperti estopel, penghadan, kecuaian (laches) dll. boleh dipakai kepada adjudikasi perindustrian.

(iii) Sama ada Mahkamah-Mahkamah rayuan, dalam prosiding *certiorari*, boleh memeriksa kedua-dua proses membuat keputusan dan juga merit-merit keputusan itu.

(iv) Samada perintah sampingan yang dibuat oleh Hakim yang bijaksana mengemukakan perkara kepada Mahkamah Perindustrian harus dikekalkan atau samada ianya patut digantikan dengan relief lain yang lebih wajar.

Diputuskan:

Oleh Gopal Sri Ram HMR

[1] Hakim yang bijaksana adalah tidak salah dalam mengeluarkan *certiorari* dan dalam membatalkan award yang diberikan oleh Mahkamah Perindustrian.

[2] Ianya merupakan undang-undang trite bahawa sesuatu pihak itu terikat oleh pliding-plidingnya. Mahkamah Perindustrian dengan itu mesti meneliti pliding-pliding dan mengenalpasti isu-isu, mengambil keterangan, mendengar hujahan pihak-pihak dan akhirnya mengumumkan penghakimannya dengan mengambil berat akan isu-isu.

[3] Dalam kes semasa ini, bukan sahaja perayu gagal untuk mengatakan bahawa terdapatnya kerugian, ianya benar-benar gagal untuk mengemukakan apa-apa keterangan bagi menyokong tuntutannya bahawa jawatan yang dahulunya dipegang oleh responden telah dihapuskan. Dengan itu tidak terdapat apa-apa bukti bahawa jawatan responden telah dihapuskan, mahupun apa-apa keputusan yang spesifik oleh Mahkamah Perindustrian bahawa jawatan itu telah dihapuskan.

[4] Material yang dikemukakan di kesemua peringkat hanya mengakui satu inferens yang wajar iaitu, bahawa jawatan responden telah tidak dihapuskan. Ianya mengikut bahawa, bukan sahaja Mahkamah Perindustrian telah membuat keputusan ynag berpihak kepada perayu atas alasan yang tidak diplidkan, tetapi perayu sendiri telah gagal untuk menyatakan bidangkuasa ke atas mana ianya telah bergantung. Dengan itu tidak terdapat perkara lebihan tenaga kerja sepertimana yang dikatakan oleh responden. Kesimpulan yang tidak dapat dielakkan adalah bahawa responden telah dipecat daripada pekerjaan dan bahawa pemecatannya adalah tanpa alasan atau sebab yang adil.

[5] Sehingga baru-baru ini, pendapat umum adalah, apabila suatu keputusan itu dicabar atas alasan "Wednesbury unreasonableness", Mahkamah hanya boleh memeriksa proses membuat keputusan sahaja dan tidak boleh memeriksa merit keputusan itu. Itu merupakan suatu kesilapan yang dikekalkan oleh kepatuhan kepada pendekatan taasub yang agak sempit. Salah anggapan doktrin ini telah terbenam dengan keputusan Mahkamah ini yang menjadi petanda dalam kes *R. Rama Chandran v. Industrial Court of Malaysia*.

[6] Suatu pemeriksaan ke atas merit sesuatu keputusan yang diikuti oleh pendapat bahawa seorang yang munasabah atau suatu badan yang munasabah dalam keadaan yang sama akan mencapai kesimpulan yang dipersoalkan, dan pembuatan keputusan yang patut dibuat pada mulanya, tidak membawa kepada suatu salahguna kuasa kehakiman yang diakibatkan oleh penyalahgunaan kuasa rayuan dalam prosiding *certiorari.*

[7] Mungkin terdapat kes-kes di mana, atas alasan kepentingan awam, kepentingan nasional, keselamatan awam atau keselamatan nasional, ianya mungkin secara keseluruhannya tidak wajar bagi Mahkamah untuk cuba mencapai satu pendapat gantian. Kes semasa ini, namun begitu tidak terlingkung dalam mana-mana kekecualian tersebut. Hakim yang bijaksana, dengan itu, bukan sahaja berhak tetapi adalah terikat oleh kewajipan untuk melaksanakan suatu pemeriksaan objektif terhadap latarbelakang fakta yang dikemukakan kepada Mahkamah Perindustrian bagi memastikan sama ada suatu tribunal wajar yang berada dalam keadaan yang sama mungkin telah mencapai keputusan yang sama juga. Dengan itu tidak terdapat salah-arahan oleh Hakim yang bijaksana di sini atas dasar pencelahan dan tidak terdapat pelanggaran terhadap lingkungan yang ditetapkan oleh kajian semula kehakiman.

[8] Ianya adalah trite bahawa Mahkamah Perindustrian seharusnya bertindak menurut ekuiti, naluri yang baik dan merit-merit substansial kes tersebut tanpa mangambil kira soal-soal bentuk dan teknikal. Doktrin estopel dengan itu, tidak seharusnya terpakai dalam adjudikasi perindustrian. Hakim yang bijaksana dengan itu adalah secara keseluruhannya betul dalam pemerhatiannya bahawa Mahkamah Perindustrian telah tersalah pertimbangan di sisi undang-undang apabila ianya memakai doktrin estopel kepada proses adjudikasi perindustrian yang terdapat di hadapannya. Dan oleh kerana pembuat keputusan awam tidak mempunyai bidangkuasa untuk membuat satu kesilapan undang-undang, maka Hakim yang bijaksana adalah juga berhak untuk memutuskan bahawa Mahkamah Perindustrian, dalam melakukan sedemikian, telah melampaui bidangkuasanya.

[9] Sehingga tercapainya keputusan dalam *R. Rama Chandran v. Industrial Court of Malaysia* dan *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan*, pendapat umum adalah bahawa satu-satunya jalan yang terbuka kepada Mahkamah Tinggi ketika membatalkan award Mahkamah Perindustrian ialah untuk mengemukakan semula pertikaian itu kepada Mahkamah terkemudian itu untuk diadjudikasikan semula. Pendekatan yang terhad dan sempit ini telah sewajarnya diketepikan oleh Mahkamah

ini dalam *R. Rama Chandra* dan oleh Mahkamah Rayuan dalam *Hong Leong Equipment.*

[10] Mahkamah ini mempunyai bidangkuasa dan kuasa untuk memberikan relief kepada responden. Dalam keadaan kes ini, walaubagaimanapun, pampasan dan bukannya penempatan semula adalah merupakan remedi yang lebih wajar. Oleh kerana tidak terdapat pertikaian atas isu kuantum, jumlah sebanyak RM151,997 sepertimana yang dipersetujui diawardkan kepada responden di samping pembayaran sumbangan KWSPnya.

[Rayuan ditolak. Perintah sekadarnya.]

Cases referred to:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

R. Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 ***(cit)***

Nadarajah & Anor v. Golf Resort (M) Sdn. Bhd. ***(aff)***

Tamil Nesan (M) Sdn. Bhd. v. K. Ganesan ***(aff)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 ***(cit)***

Goon Kwee Phoy v. J. & P. Coats (M) Bhd. [1981] 2 MLJ 129 ***(aff)***

Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan [1996] 1 MLJ 481 ***(aff)***

Hendry v. De Cruz [1949] MLJ (Supp.) 25 ***(cit)***

R. v. Attorney-General, ex parte Imperial Chemical Industries Plc [1986] 60 TC 1, 64 ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(foll)***

Harris Solid State (M) Sdn. Bhd. & 2 Ors. v. Bruno Gentil Pereira & 21 Ors. [1996] 4 CLJ 747 ***(aff)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(4), 69(5)
Rules of the Supreme Court 1980, r. 51(4), 51(5)
Rules of the Federal Court 1995, r. 138
Civil Procedure Code 1908 [India], O. 41 r. 33

Other sources referred to:

Malhotra's Law of Industrial Disputes, 4th Edn., Vol. 2, p. 942

For the appellant - N. Sivabalah; M/s. Shearn Delamore & Co.
For the respondent - P. Kuppusamy; M/s. P. Kuppusamy & Co.

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal against the decision of Abu Mansor J (now JCA.) whereby he quashed an award of the Industrial Court that upheld the appellant's act of terminating the respondent's employment.

The facts relevant to this appeal are as follows.

The appellant is a wholly owned subsidiary of the State Economic Development Corporation of Selangor. It owns and manages several businesses. Amongst these were an hotel known as the Holiday Inn City Centre and a recreational club called Kelab Darul Ehsan ("the club"). But it now no longer owns nor manages the club.

On 24 August 1985, the respondent commenced his employment with the appellant. He was initially employed as the resident manager of the Holiday Inn City Centre. By a letter dated 25 September 1986, he was, with effect from 1 October 1986, appointed as the assistant manager of the club. Later, on 1 April 1987, one Encik Bistaman Siru Abdul Rahman was appointed as the club's general manager, while the respondent was almost simultaneously appointed as its food and beverage director. Later, one Encik Azman Shah replaced Bistaman as the chief executive of the club.

On 13 November 1987, Azman Shah sent for the respondent. There was a meeting between them at which Azman Shah informed the respondent that he (Azman) had decided to abolish the post of food and beverage director. He was however prepared to appoint the respondent as the food and beverage manager with a 37% reduction in salary. The respondent was not minded to accept this offer and said so in his letter of 14 November 1987 which contained this penultimate paragraph:

> Since you are going to abolish my present position as food & beverage director, it construed as a retrenchment. If this is so, I would expect a retrenchment benefit before I leave.

This entirely proper observation by the respondent was, as will be later seen, to have adverse consequences for him in the proceedings before the Industrial Court.

That the appellant misunderstood the respondent's stand comes across from the following paragraphs of its reply to him dated 23 November 1987:

> We refer to your letter dated 14 November 1987 **with regard to your intention to be retrenched** from Perangsang Recreation Berhad.
>
> 2. After due consideration and with much regret the board **agreed to your request to leave the company** with effect from 1 December 1987. (Emphasis added.)

Now, this was clearly wrong. It was not the respondent who was seeking retrenchment. On the other hand, it was the appellant who had, through Azman Shah, informed the respondent that the very post which the respondent held was being abolished.

Not unexpectedly therefore, the respondent refused to accept the position as described in the appellant's letter of 23 November 1987. His response came by his letter dated 30 November 1987, which, shorn of formalities, reads as follows:

> Your letter dated 23 November 1987, refers. I have no reason to accept your letter and have no intention to being retrenched without any apparent reason.
>
> I merely seeked clarifications whether I am being demoted, terminated or retrenched.
>
> Since today is my last day with Kelab Darul Ehsan, I have instructed my Solicitor to take my case and he will be in touch with you shortly.

The appellant thereafter paid to the respondent a sum of RM15,296.32 as retrenchment benefit which sum the respondent, through his solicitors' letter dated 7 December 1987, expressly accepted without prejudice to his rights in industrial law.

The respondent subsequently made representations to the Director General of Industrial Relations pursuant to the provisions of s. 20(1) of the Industrial Relations Act ('the Act'). The Director General, having failed to effect a conciliation, reported the matter to the Minister who referred the respondent's representations to the Industrial Court.

In his statement of case filed in the Industrial Court, the respondent claimed that he had been terminated from employment without just cause. The appellant, in its statement in reply, disputed this. It sought to justify the respondent's termination on the ground that the post held by him had been abolished in consequence of a reorganisation and rationalisation of management positions within the appellant's group of companies. In consequence, the respondent's services had become redundant and he was therefore retrenched.

So much for the pleadings.

In the proceedings before the Industrial Court, the appellant did not lead any evidence at all in support of its contention that the post previously held by the respondent had been abolished. Despite this, it was argued by the appellant that its claim of a redundancy had been proved. It was also argued that the respondent was estopped from claiming that he had been dismissed without just cause or excuse because of his acceptance of the retrenchment benefit. These submissions found favour with the Industrial Court which dismissed the respondent's claim.

In his award, the learned Chairman dealt with the latter argument first. This is what he said:

> After having requested for a retrenchment benefit, being accepted by the company and the execution of the payment before he left the club, it is unconscionable if not wrong for the workman subsequently to come out with a statement that 'I accepted the amount' on a without prejudice basis. After having received the payment, on the last day before he left the company he handed Exhibit J dated 30 November 1987 to CW1. The letter was in reply to Exhibit G sent by the company to him. Therein the workman stated that 'I have no reason to accept your letter and have no intention to being retrenched without any apparent reason.' Surprising enough no mention was made in the letter about the sum of money received by him. I believe the money by then must have been paid as otherwise the letter would have mentioned that the money would not be accepted by him and the cheque would have been handed back to the company. He gave his reason for the delay in giving the reply to Exhibit G as he was then discussing the matter with his solicitors. If the money had not been received by then the solicitors would have advised him not to do so. Similarly, it is unconscionable if not wrong for the workman now to say that he received the money on a without prejudice basis. To me it is an afterthought.

In regard to the first and more critical issue, the learned Chairman said as follows:

> But fate had it that, which I am satisfied, **for good reason this post needed to be abolished, thereby making him redundant**. **From the evidence, I am satisfied that it is a scheme carried out by the company to reorganise owing to financial losses**. It is the right of the employer to reorganise his business in the way he likes for the purpose of the economy or convenience provided he acts *bona fide*. An employer has a right to determine the number of his employees consistent with his business or organisation and if by the implementation of such reorganisation scheme adopted for reasons of economy and better management of his business the services of some of the employees were found to be in excess of the requirement of his business the employer is entitled to discharge such excess. In such a case an arbitration Court will not intervene: Award No. 237/87 [1987] 2 ILR 80. Was there bad faith on the part of the company that the services of the workman was terminated under the guise of redundancy? The workman felt that CW1 had a grudge against him over an incident earlier in the year of 1987 when he was holding the position of assistant general manager. CW1 was very angry with the club and accused him of pinching the staff from City Centre. Surprising enough this issue was never brought out during the cross-examination of CW1. In any event, the purported incident took place earlier in the year and the termination of his services took place in late 1987 and in between the period there was nothing at all to suggest that there was enmity between them. In the circumstances, I would not accept the contention by the workman as being the ground for the termination of his service as food & beverage director. (Emphasis added.)

The respondent, being dissatisfied with the findings of the Industrial Court, successfully moved the High Court for *certiorari* and had the award quashed. The High Court also issued *mandamus* directing the Industrial Court to re-adjudicate the dispute. The reasons for the learned Judge's decision appear sufficiently from the following passages of the learned Judge's judgment:

> Learned Counsel further submitted that the learned Chairman misdirected himself in law just because the claimant received his retrenchment benefit but it must be remembered it was on a without prejudice basis. Since the date of the award, two High Court decisions had since cleared the air. In *Nadarajah & Anor v. Golf Resort (M) Sdn. Bhd.* [1991] 1 ILR 704 Dato' Hj. Mohd. Eusoff b. Chin J. (as he then was) on a submission of the claimant being estopped from claiming just because he had received his retrenchment benefit, the learned Judge held it is clear from s. 30(5) of the Industrial Relations Act, technical rules such as estoppel, limitation or laches etc., unless otherwise provided for in the Act, have no place and should not be invoked. The unreported case of *Tamil Nesan (M) Sdn. Bhd. v. K. Ganesan* also decided so on this point.
>
> Learned applicant's Counsel submitted that if the Industrial Court had had sight of these decisions, the verdict would certainly have been different.
>
> On this point of perversity, I agree that the applicant had succeeded in convincing me that the Industrial Court's decision on this point was perverse and I make that finding on the face of the record.
>
> As to the claimant being redundant and so he was dismissed, in my considered view the Industrial Court had made an error. In the first place such plea as loss was never pleaded by the respondent. What in fact in the evidence was the company underwent reorganisation and resulted in the claimant being redundant. Suffice to say that the Industrial Court made an error in its trying to find another reason for the claimant's dismissal, different from what was stated to be the reason by the respondent, as a misdirection and an error in law. It is true to say that and I find it to be so that redundancy because of abolishing of job function has not been made out.
>
> In deciding whether the Industrial Court had made an error I have considered the respondent's submission that this is not an appeal and what I must examine is not the decision but the decision making process. I am unable to say, as submitted by the respondent's Counsel, that in handing out its decision that the Industrial Court had not committed errorsI have considered the sum total of the respondent's submission and that of the applicant, and bearing in mind the evidence as a whole and the authorities shown to me, I have no hesitation in saying that the decision of the Industrial Court was perverse on the claimant's claim for retrenchment benefit and on the issue of redundancy.

Before us, Encik Sivabalah of counsel for the appellant attacked these findings by the learned judge on several grounds. We find it unnecessary to deal with all of them. Suffice that we address the two main criticisms he levelled against the approach adopted by the learned Judge.

First, it was submitted that the learned judge exceeded his role in judicial review proceedings and actually exercised appellate jurisdiction when he quashed the award. Counsel relied on several leading decisions of the precursors of this Court that establish the principle that in *certiorari* proceedings the function of the Court is one of review only, confined to the decision-making process and not to the merits of the decision itself. The principle is so well-settled that we find an examination of the authorities to be quite unnecessary.

However, it is quite apparent from the passages which we have quoted from the judgment that the learned judge was entirely aware of the nature of the jurisdiction he was called upon to exercise. It must be borne in mind that the principal ground of complaint advanced by the respondent before the learned judge was that the award was perverse. That is simply another way of saying that the award was one which no reasonable tribunal in the circumstances would have made. In public law this proposition is known as "Wednesbury unreasonableness"; a shorthand form to summarise the Delphic pronouncement by Lord Greene in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223. It is one of the well-recognised grounds upon which the decision of a public decision-maker may be challenged in the Courts.

Until very recently, it was generally thought that when a decision is challenged on grounds of "Wednesbury unreasonableness", the Court is confined to an examination of the decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is always confined to the decision-making process and never with the merits of the decision itself was exploded by the landmark decision of this Court in *Rama Chandran v. The Industrial Court of Malaysia & Anor,* Supreme Court Civil Appeal No. 02-13-1994, [1997] 1 CLJ 147.

Edgar Joseph Jr. FCJ, who formed the majority, explained the true principle in language that merits recollection:

> It is often said that judicial review is concerned not with the decision but the decision-making process. (See, e.g. *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in Council of *Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, where the impugned decision is flawed on the ground of procedural impropriety.

But, Lord Diplock's *other* grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for *process*, but also for substance.

In *Council of Civil Service Unions v. Minister for the Civil Service* (*supra*) Lord Diplock explained the expression "irrationality" as follows:

> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

In *Chief Constable of the North Wales Police v Evans* [1982] 3 All E.R. 141, 142, Lord Hailsham expressed the traditional approach of English common law to the judicial review function as follows:

> Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the Court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. **There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits**. I am not sure whether Lord Denning MR really intended his remarks to be construed in such a way as to permit the Court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. **The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court**. (Emphasis added.)

In our judgment, the correct approach to the "Wednesbury unreasonableness" and the proportionality tests is that adopted by Lord Denning MR in the Court of Appeal in *Evans*. We therefore find the criticism of his approach by the

House to be unwarranted. The continued reluctance of English Courts to come to grips with the practical realities of applying the "Wednesbury unreasonableness" test (see, for example, *R. v. Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696) in no way deters us from accepting as correct the view expressed by Edgar Joseph Jr. FCJ in *Rama Chandran.* An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in *certiorari* proceedings.

Of course, there may be cases in which, for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the Judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule.

The present case does not fall within any of the exceptions we mentioned a moment ago. The learned Judge was therefore entitled, — indeed he was under a duty — to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstanced would have come to the like conclusion. There was, therefore, no misdirection in law by the learned judge upon the basis of intervention and no transgression of the prescribed parameters of judicial review. For these reasons, we entertain no difficulty in rejecting the first submission advanced on the appellant's behalf.

That brings us to Mr. Sivabalah's second and alternative submission. The argument here is that even if the learned Judge kept well within the limits of the judicial review function, he was nevertheless wrong in the conclusions he arrived at. It was submitted that a reasonable tribunal appraised of the facts would have come to the same conclusion as did the Industrial Court in the present case. These arguments call for an examination of the material that was placed before the Industrial Court.

The first ground upon which the Industrial Court denied the respondent relief was his conduct in all the circumstances of the case, with particular regard to his acceptance of the redundancy payment from the appellant. As may be seen from those passages of the award which we have earlier reproduced,

the learned Chairman held that the respondent, by his conduct in question, was precluded from claiming that he had been dismissed without just cause or excuse.

The learned judge very properly treated this conclusion as being in substance a finding based on the doctrine of estoppel. He relied upon the decisions in *Nadarajah & Anor v. Golf Resort (M) Sdn. Bhd.* and *Tamil Nesan (M) Sdn. Bhd. v. K. Ganesan* as authority for the proposition that the doctrine of estoppel is not to be applied in industrial adjudication.

In *Nadarajah* (*supra*), Eusoff Chin J. (now Chief Justice of the Federal Court) observed that the Industrial Court

> must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Technical rules such as estoppel, limitation, laches, acquiescence, etc (unless otherwise provided for in the Act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper.

In the *Tamil Nesan* case, Mohd. Yusof J. (as he then was) applied with approval the following passage appearing at p. 1591 in the second volume of the *Law of Industrial Disputes by Malhotra,* fourth edition, a leading treatise on the subject:

Estoppel and waiver.

> The technicalities of the procedural law i.e. Code of Civil Procedure or the Evidence Act do not apply to industrial adjudication. But fundamental principles of procedural law, cannot be given go-by whether called the rules of natural justice or by any other name. For instance, even if some workmen accept certain amount 'in full and final settlement of their account', they cannot be estopped from further claiming their legitimate dues nor can there be waiver in this respect of the rights accruing to them under the industrial law. The principle of estoppel or waiver cannot be rigorously applied against the workmen especially when it is not clear that they accept compensation given by the management in full satisfaction of their claim after having been made aware that they were entitled to higher compensation.

We entertain no difficulty in affirming, without qualification, the propositions established by the foregoing two decisions.The learned judge was entirely correct in applying them and in his observation that the Industrial Court had erred in law in coming to the conclusion it did upon the point under discussion. Since a public decision-maker has no jurisdiction to make an error of law (see, *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 MLJ 317), the learned Judge was entitled to hold that the Industrial Court had exceeded its jurisdiction in applying the doctrine of estoppel to the process of industrial adjudication.

The other ground on which the learned Judge acted to quash the award in the instant case arose from the Industrial Court's finding that the respondent had been made redundant because of the losses suffered by the appellant. The learned Judge's conclusion that the Industrial Court was wrong in upholding the respondent's termination on a ground not advanced by the appellant in its pleaded case is certainly supported by pronouncements made in two leading cases.

In *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 2 MLJ 129, 136, Raja Azlan Shah CJ (Malaya) (as he then was) explained the role of the Industrial Court as well as the High Court on matters of proof in industrial adjudication:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. **If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it**.
>
> ...
>
> But on the finding that there was no redundancy as suggested by the company the conclusion is inevitable that the termination was without the cause or excuse advanced and therefore without just cause or excuse.
>
> We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for *certiorari*, we are of the opinion for the reasons given by this Court in *Dr. Dutt's* case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement. (Emphasis added.)

In *Rama Chandran v. The Industrial Court of Malaysia & Anor,* (*supra*) Eusoff Chin CJ, Malaysia, put the matter beyond any doubt. He said:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil

> Court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

In our judgment, the failure by the Industrial Court to adhere to these salutary principles amply supports the learned Judge's conclusion. Quite apart from the reasons given by the learned Judge, the answer to Counsel's complaint lies, we think, in the observation made by the learned President of the Court of Appeal during argument. As pointed out by his Lordship, not only did the appellant fail to allege that there were losses, it singularly failed to lead any evidence in support of its claim that the post previously held by the respondent had been abolished. In this context, we need do no more than to quote the following passage appearing in "*Dismissal, Discharge, Termination and Punishment*" by Malhotra, tenth edition, volume 1, at page 791:

> The order of retrenchment, therefore, should of course be left to the management and the decision of management that some are better qualified cannot be questioned by the Tribunal unless it comes to the conclusion that the preferential treatment was *mala fide*. If the preferential treatment given to juniors ignores the well recognized principle of industrial law that 'last come, first go', without any acceptable or sound reasoning the Tribunal will be justified to hold that the action of the management was not *bona fide*.
>
> But the rule of 'last come, first go' could have obviously no application to the case of retrenchment of the only employee in a particular category of workmen because in such a case **it is retrenchment of the post itself**, and therefore, if for reasons of economy and any genuine interest of reorganization, the services of a single employee of a category have to be dispensed with, there is no scope for the application of this principle. (Emphasis added)

At the risk of repetition, we emphasise that there was here, no proof that the respondent's post had been abolished. Nor, we may add, was there a specific finding by the Industrial Court that the post in question had been abolished. The material made available at all levels admits of only one reasonable inference, namely, that the post was not abolished. It follows that not only did the Industrial Court find for the appellant on an unpleaded case, but the appellant had itself failed to make out the justification relied upon by it. There was, therefore, no redundancy as alleged by the respondent. The inevitable conclusion we reach on the proved and undisputed facts is that the respondent was dismissed from his employment and that his dismissal was without just cause or excuse.

Having carefully considered the submissions of Counsel for the appellant we were left unconvinced that the learned judge had erred in issuing *certiorari* and in quashing the award of the Industrial Court. We therefore found it unnecessary to call upon Counsel for the respondent for a reply. All that remained was to dismiss the appeal and determine the question whether the consequential order made by the learned Judge remitting the matter to the Industrial Court should remain, or whether it ought, in the circumstances of this case, be substituted for some other more appropriate relief. And on this question we invited argument from Mr. Sivabalah, who, informed us that he had anticipated the question and was therefore prepared to deal with it.

The question that we specifically put to Mr. Sivabalah was whether this Court had the jurisdiction and the power to substitute the order of remission with an award of fair and reasonable compensation. We drew Counsel's attention to the decision of this Court in *Rama Chandran* (*supra*) and of the Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481 which, in our judgment, sufficiently answer the question in the affirmative.

Until the decision in these two cases, the view generally held was that the only course open to the High Court when it quashed an award of the Industrial Court was to remit the dispute to that Court for re-adjudication. This was the result of slavish adherence to English precedent without any reference to our own written law, in particular, paragraph 1 of the Schedule to the Courts of Judicature Act 1964. The narrow and restrictive approach that had hitherto prevailed was rightly cast aside by this Court in *Rama Chandran* (*supra*). Eusoff Chin CJ, Malaysia, who led the majority exposed the fallacy of the previous practice in the following passage in his judgment:

> The High Court's jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of *certiorari* was developed and came to be granted by the Courts in England. Of course if the application for certiorari is dismissed, that ends the matter. **But if the application is allowed, the Court has surely to mould the order. If we were to merely grant *certiorari* to quash the award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the claimant.**
>
> Having carefully considered the question, I am not persuaded by the submission of the learned Counsel for the Society that we should remit the case to the Industrial Court with a direction to make the necessary consequential orders. As far as possible the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its attention. **On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties.**

In the circumstances, justice demands that to avoid further delay and expense, we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose. (Emphasis added.)

In *Hong Leong Equipment* (*supra*), one of the judgments of the Court of Appeal recognised that

> the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our Courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of Courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
>
> In my judgment, the wide power conferred by the language of para. I of the Schedule enables our Courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.
>
> Let me illustrate. Assume for a moment that an award of the Industrial Court upholding the dismissal of a workman is quashed by *certiorari*. The ordinary course — and this is the course that would be taken by an English Court — would be to remit the matter to the Industrial Court by way of mandamus to compel it to rehear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.
>
> In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal.

We have no hestitation in accepting that the above quoted passages in these two cases accurately represent the law.

Counsel for the appellant, however, invited us to depart from the majority views expressed in *Rama Chandran* and to uphold the minority judgment of Wan Yahya FCJ. We must emphatically reject this invitation for two reasons.

First, although *Rama Chandran* was decided by a majority, it is nevertheless a decision of this Court. Contrary to any view that may be held in any quarter, this Court is bound by its own decisions, whether arrived at unanimously or

by a majority. And the correctness of the decisions of this Court may not be called into question save and except before a larger Bench of this Court specially convened by or upon the direction of the Chief Justice. It is therefore not open for one division of this Court to reverse the decision of another division given in an earlier case. If a contrary situation be permitted, then, no decision of the apex Court will be safe as precedent and uncertainty in the law will prevail. For like reason, the Court of Appeal is bound by its own decisions. See, *Hendry v. De Cruz* [1949] MLJ (Supp.) 25.

In dealing with an argument such as that presented before us, it is useful to remind ourselves of the basic philosophy of our common law. That philosophy is housed in the expression "certainty through precedent". Its main object is to enable members of the public to organise their affairs in accordance with law and for legal advisers to advise their clients with fair accuracy about the state of the law in order to avoid wasteful and unnecessary litigation. A rule by which one division of this Court is not to be bound by the decisions of another division will therefore undermine the very foundations upon which our common law rests and cannot therefore be countenanced.

Second, and more importantly, we accept that, for the reasons set forth therein, the majority judgments in *Rama Chandran* are correct and that the minority judgment of Wan Yahya FCJ is wrong. To merely say that because a reasonable tribunal would have found the dismissal to have been unjust and leave the matter there without more is to abdicate the judicial review function entrusted to the superior courts by the Federal Constitution and Parliament.

As observed by Lord Oliver in *R. v. Attorney General ex parte Imperial Chemical Industries Plc* [1986] 60 TC 1, 64:

> [I]t does seem to me that it must be wrong in principle, when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy, unless, at any rate, there are extremely strong reasons in public policy for doing so.

Having decided that we have jurisdiction to award relief, we now turn to the question whether we have the necessary power to do so in the present case. We make this distinction for the reason that a Court while having jurisdiction to grant a particular relief may lack the power to do so.

Thus, in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1, 3 Thomson CJ said that:

> there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

Although these words were spoken when interpreting the Courts Ordinance, 1948, they are of general application to the judicial function and hold true in the context of the Courts of Judicature Act 1964.

Having given the matter due consideration, we are of the view that this Court is seised of power to grant the respondent appropriate relief in this case.

We begin by reminding ourselves that this appeal was lodged before the creation of the Court of Appeal. It therefore stands to be dealt with in accordance with the Rules of the Supreme Court 1980 by reason of r. 138 of the Rules of the Federal Court 1995, which reads as follows:

> The Rules of the Supreme Court 1980 is hereby repealed:
>
> Provided that any proceeding which is pending before the Supreme Court on 23 June 1994, shall be continued and concluded by the Federal Court under the Rules of the Supreme Court 1980.

Sub-rules 4 and 5 of r. 51 of the Rules of the Supreme Court 1980 regulate the powers of this Court in regard to the present appeal and they provide as follows:

> (4) The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

It is noteworthy that these two sub-rules are couched in language identical to s. 69 (4) and (5) of the Courts of Judicature Act respectively. The sub-sections now apply only to appeals to the Court of Appeal, there being no similar provision existing in respect of appeals to this Court at present.

In *Rama Chandran,* this Court allowed the appeal and made a finding that the appellant workman had been dismissed without just cause or excuse. It was therefore in a position to award him compensation in lieu of reinstatement. In the present case, however, we had decided to dismiss the appeal after concluding that the respondent had been unjustly dismissed. Does this difference affect the powers that we may exercise? We do not think that it does.

In *Harris Solid State (M) Sdn. Bhd. & 2 Ors. v. Bruno Gentil Pereira & 21 Ors.* [1996] 3 AMR 3546, the High Court, as in the present case, had quashed an award of the Industrial Court against the workmen and remitted

the dispute to that Court for re-adjudication. The employer appealed. The Court of Appeal, having dismissed the employer's appeal, substituted the consequential order made by the High Court by substituting it with an order directing reinstatement. Section 69(4) of the Courts of Judicature Act 1964 was relied on to effect the variation. Attention was called to the similarity in language between the section and the first limb of r. 33 of O. 41 of the Indian Civil Procedure Code 1908. The latter provision is in the following terms:

> The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

We would additionally point out the likeness in phraseology between the second limb of the Indian provision and sub-rule (5) of r. 51 of the Rules of the Supreme Court as well as s. 69(5) of the Courts of Judicature Act 1964.

In *Harris* (*supra*), the Court of Appeal, after a discussion of the relevant Indian cases, held that it had the power:

> in a proper case [to] make consequential orders even after dismissing an appeal in order to achieve complete justice.

We accept this as an accurate statement of the law and as being applicable to this Court in respect of those appeals falling within the proviso to r. 138 of the Rules of the Federal Court.

Having decided that this Court has the jurisdiction and the power to grant relief to the respondent, all that remained was to determine the nature of the relief that ought to be granted. The principles that govern the relief that is to be awarded in cases of this nature are sufficiently set out in Malhotra's The Law of Industrial Disputes, fourth edition, Volume 2 p. 942:

> From the decided cases, no hard and fast rule of universal application is discernible as to which circumstances would, in a given case, constitute an exception to the general rule of reinstatement. The Labour Appellate Tribunal in the *Buckingham and Carnatic Mills* case [1951] 2 LLJ 314 stated that 'the past record of the employee, the nature of his alleged present lapse and the ground on which the order of management is set aside' are some of the relevant factors for consideration. The conduct of the workman is also a vital factor to be taken into account by the Tribunal before ordering reinstatement. In this connection, expressing himself in rather vehement language, a single Judge of the Calcutta High Court said, 'supposing the Tribunal comes to the conclusion that the employee is a rogue or a black guard or a thoroughly incompetent one, unable

to perform his job, it is ridiculous to suggest that such matters are irrelevant and the Tribunals must still reinstate the worker and shut their eyes to the real state of things'. (*Hukumchand Jute Mills Ltd. v. Labour Appellate Tribunal* [1959] 1 LLJ 595) Trustworthiness of the worker is one of the important factors to be taken into account. The nature of the relations between the employer and the employee is also a relevant factor to be taken into consideration. The Tribunal is also to safeguard the interests of the employer including the consideration of discipline in the establishment. **The nature of the duties performed by the employee and the nature of the industrial establishment employing him, is also a relevant consideration.** These cases are merely illustrative where an exception to the general rule of reinstatement is to be made. No comprehensive rule, as to which circumstances would in a given case constitute an exception to the general rule, can possibly be laid down. In each case, keeping the objectives of industrial adjudication in mind, and in a spirit of fairness and justice, the Tribunal has to deal with the question, whether the circumstances of the case require that an exception should be made and compensation would meet the ends of justice. If, on taking these principles and the relevant factors into consideration, the Tribunal comes to the conclusion that reinstatement would not be desirable or expedient in the circumstances of the case, it may award compensation instead of reinstatement to the workman in spite of the fact that his discharge or dismissal was invalid owing to some infirmity in the impugned order. (Emphasis added.)

Taking into account all relevant circumstances, including the fact that the respondent in the instant appeal performed an executive function in a recreational club, we came to the conclusion that reinstatement is not the appropriate remedy. Further, we were informed by Mr. Sivabalah from the bar that the ownership of the Club had changed hands. In these circumstances it would, in our judgment be unjust to compel the new management to employ the respondent.

Upon the quantum of compensation that should be awarded to the respondent there was no quarrel between Counsel. Neither the multiplier nor the multiplicand were in doubt. It was common ground, based on the undisputed evidence on the record that the last drawn salary of the respondent was RM4,575 per month with contributions to the Employees Provident Fund ("EPF"). Counsel on both sides agreed that the period for which the salary ought to have paid was three years. Accordingly we awarded the respondent RM151,997 ie., RM4575 x 36 months. In addition, we directed the payment of the necessary EPF contributions. We also ordered that this sum was to be paid within two months from 28 August 1996, being the date on which we heard and disposed of the appeal.

For these reasons, the appeal was dismissed. The orders of the High Court were affirmed save to the extent that the order remitting the dispute to the Industrial Court was varied to the extent that the appellant was ordered to pay the respondent the aforementioned compensation in lieu of reinstatement. The appellant was also directed to pay the costs of this appeal. The deposit paid into Court by the appellant was ordered to be paid out to the respondent to account of his taxed costs.

Reported by W.A. Sharif